Code do not refer to the charge but to the question of reasonable grounds for believing the guilt in respect of a particular offence. In my opinion, there is a wide distinction between the charging of an offence and of there being reasonable grounds for believing guilt. It may well be that in the initial stages of a criminal prosecution the fact that the Public Prosecutor has elected to charge a man with an offence coming within the proviso of section 388(i) may provide *prima facie* evidence of such reasonable grounds, but the law still remains that there must be reasonable grounds for believing the guilt. As I said, I am inclined to the view that the statement of the law by Mr. Justice Spencer Wilkinson, to which I have referred, is an incorrect one, but for purposes of deciding the application before me, it is unnecessary for me to go that far. When *R.* v. *Chan Choon Weng & Ors.* was decided the Criminal Justice Ordinance No. 14/53 had already become law. Section 2(1) therein provides:—

"No person shall be sentenced by a Court to penal servitude; and every law conferring power on a Court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Ordinance."

After the 30th April, 1953, all offences punishable with penal servitude had to be construed as if the words "penal servitude" were replaced with the term "imprisonment".

In reply to this argument, the learned Deputy Public Prosecutor suggested that section 2 was in effect an amendment of the words "penal servitude", wherever they appear, including section 388(i), to imprisonment. I am unable to agree with him because section 2 is clear in its terms when it says that it is only the laws "conferring power to pass a sentence of penal servitude" which are amended to a term of imprisonment not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of the Ordinance. I am strengthened in the view I take by the fact that the Legislature found it necessary to expressly amend section 301 of the Criminal Procedure Code by substituting "imprisonment and fine" for the words "penal servitude, rigorous imprisonment, and simple imprisonment." In my opinion, the effect of Ordinance No. 14/53 in practice is that the only non-bailable offences are those punishable with death.

The order of the Magistrate of the 29th June, 1959, refusing bail is set aside. The matter is referred back to the Magistrate's Court to re-hear the application for bail.

Order accordingly.

LEONG POH CHIN v. CHIN THIN SIN

[A. C. J. (Good J.) August 27, 1959]

[Ipoh — Civil Appeal No. 12 of 1958]

Contract — Claim based on illegal contract — Illegality of consideration not pleaded — Duty of Court — Contracts (Malay States) Ordinance, 1950, s.24.

Forest Enactment (Cap. 153), ss.20 and 22 — Permit under s.22(c) — Sub-lease of — Whether rights under permit transferable.

The appellant in this case in consideration of a loan of $1,000 by the respondent entered into an agreement whereby he purported to assign all his rights and liabilities under a Forest Permit to the latter's wife. Under the Permit the appellant obtained the right to fell timber in a forest reserve and there was evidence that the respondent's wife did actually operate in purported exercise of rights assigned to her by the appellant.

The respondent obtained judgment against the appellant for the $1,000 claimed as money lent. On appeal the appellant was given liberty to add a new ground of appeal: "From the evidence before the Court the learned Magistrate should have found that the plaintiff was in *pari delicto* and his claim was based on an illegal contract and should have dismissed this claim on that ground. The Court should always take notice of the illegality of the contract even though it has not been specifically pleaded."

Held: (1) under sections 20 and 22 of the Forest Enactment a person cannot lawfully exercise rights in a reserved forest by virtue of permission granted to someone else. The respondent's wife's exercise of the purported rights assigned to her by the appellant was a breach of the provisions of the Enactment and an illegality;

(2) notwithstanding that illegality had not been pleaded in this case, it was the duty of the Court to take the point although the litigant had not taken it.

Cases referred to:—

(1) *Phillips* v. *Copping* [1935] 1 K.B. 15.

(2) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.

CIVIL APPEAL.

N. Sharma for the appellant.

J. R. Devadas for the respondent.

Good J.: This is an appeal against the decision of the learned Magistrate, Ipoh, by which he gave judgment in favour of the plaintiff for $1,000 claimed as money lent. The facts are fully set out in the learned Magistrate's grounds of judgment.

By an order of this Court dated the 30th January, 1959, the Appellant was given liberty to add a new ground of appeal to his Memorandum of Appeal filed on the 9th October, 1958. This ground is as follows —

"From the evidence before the Court the learned Magistrate should have found that the plaintiff was in *pari delicto* and his claim was based on an illegal contract and should have dismissed this claim on that ground. The Court should always take notice of the illegality of the contract even though it has not been specifically pleaded."

I proposed to deal with this ground of appeal first since on the view that I have taken it disposes of the whole appeal.

The plaintiff opened his case with the following evidence:—

"I know the defendant, he is a sawmill owner. He is holder of Forest Permit No. K.K. 1/56 to fell and remove timber from Piah Forest.

In March, 1956 he came to me and asked me to give him a loan of $1,000/- to enable him to renew the permit. I agreed to give him the loan on condition that I hold the receipt issued by the Forest Department as security and he takes me as a partner. He agreed to these terms."

The defendant in his evidence said:—

"In 1956 I got permission to operate in the forest reserve, w.e.f. April."

This was confirmed by the Chief Clerk of the Forest Department, Kuala Kangsar, (D.W. 2) who said:—

"In early part of 1956 he (defendant) was allowed to resume timber work in Piah Forest Reserve Compartment 4."

Although the plaintiff stated that he had insisted upon being taken into partnership by the defendant in consideration of the loan of $1,000, the defendant in fact entered into an agreement dated 15th March, 1955, whereby he purported to assign all his rights and liabilities under his previous Forest Permit No. 295/47 to the plaintiff's wife and another person since deceased; and on the 31st March, 1956, a further agreement was entered into between the same parties referring to the agreement of 15th March, 1955, reciting the renewal of the defendant's Permit No. 295/47 by the issue of a new Permit No. 1/56 and containing an agreement that in consideration of $1,000 paid by the plaintiff's wife and the party now deceased to the defendant the defendant was to pay this sum to the Forest Department as a deposit in order to obtain the right to fell timber.

It is perfectly clear from this evidence that the plaintiff lent $1,000 to the defendant in consideration of the benefits accruing to the plaintiff's wife under the agreement of 15th March, 1955, which was continued in force in relation to the new Permit No. 1/56 by the agreement of 31st March, 1956.

Unfortunately neither party thought fit to produce the Permit or a certified copy of it in evidence, but it appears to me that it is the fact of the Permit having been issued to the defendant and not the contents of it which is the governing factor in the present case.

A certain amount of confusion has been introduced into this case by the promiscuous use of the word "licence". It was even used by the Chief Clerk of the Forest Department not it is true with respect to the particular document under which the defendant obtained his rights but in a general statement that a licensee cannot sublease his licence. The felling and cutting of timber in a reserved forest and the collection and removal of such timber is not controlled by licence. Licences are issued under Part II of the Forest Rules, 1935, for the taking of forest produce on State land, reserved land other than reserved forests, and alienated land. The right to conduct such operations in a reserved forest is derived from permission granted by a Forest Officer empowered under section 52 of the Forest Enactment and by virtue of section 22(c) and under rule 25 the power to grant such permission is conferred upon the State Forest Officer and any other Forest Officer authorised in writing by him. It follows that what the defendant obtained was permission to do in a reserved forests acts which would otherwise be unlawful. The Forest Department may for convenience describe such permission as "Permit No. 1/56" as appears from the several references to which I have already alluded to that Permit. The Chief Clerk referred to it as a permit when he said that the Department had not taken any action against the defendant for subleasing his "Permit" but the words earlier in his evidence "He was *allowed* to resume timber work . . . . . ." provide the clue to the true position which is correctly described by the defendant when he says: "I got *permission* to operate." There is no other legal machinery provided in the Enactment or the Rules whereby the defendant could have acquired the rights which he purported to transfer to the plaintiff's wife and another.

It is perfectly clear from the wording of sections 20 and 22 of the Enactment that a person cannot lawfully exercise rights in a reserved forest by virtue of permission granted to someone else. On the plaintiff's own evidence his wife actually operated in purported exercise of rights assigned to her by the defendant. This was a clear breach of the provisions of the Enactment and an illegality. It was also on the plaintiff's own case the consideration for the loan. Section 24 of the Contracts (Malay States) Ordinance, 1950, declares void every agreement of which the object or consideration is unlawful. If the agreement is void it cannot be enforced. It is a mere nullity.

Illegality of consideration was not pleaded by the defendant. In the course of cross-examination he admitted that the agreement by which he purported to assign his rights to the plaintiff's wife was illegal, and the question of illegality was referred to by both Counsel in their submissions at the close of the case; but the learned Magistrate in the course of an otherwise careful judgment has not dealt with it, no doubt because it was not referred to in the pleadings. However, there is an abundance of authority for the proposition that notwithstanding that illegality may not have been pleaded, it is the duty of the Court to take the point although the litigant may not take it *Phillips* v. *Copping*[1]; *Hee Cheng* v. *Krishnan*.[2]

On this ground the appeal must be allowed and I reverse the decision of the learned Magistrate and dismiss the plaintiff's claim with costs to the defendant both here and in the Court below.

Appeal allowed.